A **FAM MENG SIONG & ANOR**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: M-05-107-2008]
C 27 MARCH 2012

CRIMINAL LAW: *Penal Code - Section 149 - Conviction and sentence - Appeal against - Whether appellants participated in unlawful assembly with common object of causing death of deceased - Whether prosecution* D *proved appellants had 'common object' in commission of offence - Whether there was sufficient evidence to support trial judge's findings of facts - Whether conviction and sentence affirmed*

CRIMINAL PROCEDURE: *Trial - Charge - Alternative charge - Tendering of - Absence of written consent from Public Prosecutor -* E *Whether trial of appellants on alternative charge a nullity - Whether within Public Prosecutor's discretion to decide charges preferred in course of trial - Whether appellants prejudiced - Whether there was miscarriage of justice - Criminal Procedure Code, s. 158*

F This was an appeal by the appellants against their convictions on an alternative charge under s. 149 of the Penal Code ('the Code') and punishable under s. 302 of the said Code. Originally, the first and second appellants were charged and tried for an offence of murder under s. 302 of the Code read with s. 34 of the same for G causing the death of one Te Lui Yet ('deceased'). In the midst of the trial at the High Court, the Deputy Public Prosecutor ('DPP') tendered an alternative charge under s. 149 of the Code against the appellants. At the end of the prosecution case, the trial judge found that the prosecution had failed to prove a *prima facie* case H against the appellants on the original charge of murder (s. 302 of the Code). However, the trial judge found that the prosecution had established a *prima facie* case against the appellants on the alternative charge and called upon them to enter their defence. The appellants gave evidence on oath. At the end I of the trial, the trial judge found them guilty of the alternative charge of being members of an illegal assembly with the common object of committing the murder of the deceased and sentenced

both the appellants to death. The appellants raised several grounds of appeal, *inter alia*: (i) the learned judge was wrong in allowing the prosecution to introduce an alternative charge under s. 149 of the Code as there was no written consent by the Public Prosecutor under s. 177A of the Criminal Procedure Code ('CPC') for prosecution of the appellants on the alternative charge; (ii) the introduction of the alternative charge in the midst of the trial had placed the appellants in a tactical disadvantage; (iii) the learned judge had erred in calling upon the appellants to enter their defence on the alternative charge after having acquitted them on the original charge; (iv) the prosecution had not made out a case for an offence under s. 149 of the Code; (v) the prosecution had failed to prove that the appellants had a 'common object' in the commission of the offence in the alternative charge.

Held (dismissing the appeal; affirming conviction and sentence)

Per Abu Samah Nordin JCA (Aziah Ali JCA concurring) delivering the majority judgment of the court):

(1) The trial of the appellants on the alternative charge was not a nullity notwithstanding the absence of a written consent from the Public Prosecutor. The prosecution at the High Court was conducted by the DPP himself. Under the circumstances, consent to the prosecution of the accused persons on the alternative charge could be implied (*Tarmizi Yaacob & Anor v. PP & Another Appeal,* refd). (para 17)

(2) It is within the discretion of the Public Prosecutor to decide what charges should be preferred in the course of the trial. The discretionary power of the Public Prosecutor to prefer an alternative charge before the close of the prosecution case is not a transgression of the power of the court to alter or add a charge at any time before judgment under s. 158 of the CPC. The appellants were not in any way prejudiced by the introduction of the alternative charge to which they claimed trial. There was no ground herein to conclude that there was a miscarriage of justice. (paras 18-19 & 21)

(3) There was sufficient evidence which pointed to the 'common object' of the appellants based on the evidence of PW7, PW8 and PW21. PW7 had seen the first appellant use a baseball bat to hit the deceased's head. PW8 saw the second appellant hitting the deceased with his hands. The doctor (PW10) who conducted the post mortem on the deceased

gave evidence that there were laceration wounds on the head of the deceased caused by a blunt object. The cause of death was due to multiple stab wounds. There was evidence from PW7 and PW21 that sharp objects such as knife and "parang panjang" were used by the other members of the unlawful assembly in the prosecution of the common object resulting in the multiple injuries suffered by the deceased. (paras 27, 29 & 30)

(4) There was sufficient evidence to support the learned judge's findings of fact that the appellants had participated in the unlawful assembly with the common object of causing the death of the deceased and that being members of the unlawful assembly, they knew that the said offence would be likely to be committed in the prosecution of that common object. (para 34)

Per Hishamudin Mohd Yunus (dissenting):

(1) Section 166 of the Criminal Procedure Code ('the CPC') does not confer any power on the prosecution to tender an alternative charge after the trial has progressed. An alternative charge, like the principal charge, in order for it to be tendered by the prosecution without intervention of the trial court, must be tendered at the commencement of the trial. (paras 24 & 25)

(2) An alternative charge is an additional charge to the principal charge for the purpose of ss. 158 and 159 of the CPC. Once a trial has started, any addition to the principal charge can only be done with an order of the trial judge pursuant to s. 158 of the CPC. The prosecution could no longer tender the additional charge as of right. If the prosecution wished to tender an additional charge (which includes an alternative charge) at any stage once the trial has progressed, it must make an application to do so under s. 158 of the CPC. (para 26)

(3) Once a trial has commenced, the trial judge is in control of the proceedings and not the prosecution. He is the adjudicator. The trial judge is there to ensure that the trial is conducted in a fair manner. It would be prejudicial to the defence if the prosecution is given a free hand to tender an alternative charge at any time it likes after the trial had

commenced. Maintaining fairness in the proceedings requires that the tendering of the alternative charge has got to be made through the trial judge, and the prosecution must justify the tendering of the alternative charge at that stage of the proceeding. The prosecution could not tender an alternative charge in the midst of the trial merely as an afterthought; or merely because the prosecution had not carefully studied its case before preferring the original charge. Further, one of the requirements of s. 159 is that it is mandatory for the trial court to ask the accused as to whether he was ready to be tried on the added charge. This had not been done in the present case. (para 27)

(4) The alternative charge was invalid. This tainted the legality of the whole trial which had become a nullity. Section 422 of the CPC could not be invoked to salvage the situation. This was not a case of mere irregularity. The legal defect was fundamental (*Harun Abdullah v. Public Prosecutor*, refd). Further, art. 145 of the Federal Constitution does not give any power to the Public Prosecutor to disregard the provisions of the CPC. The CPC is enacted by the Parliament to ensure that criminal proceedings are conducted in a fair manner. Herein, the trial had not been conducted in accordance with the law. Hence, the conviction and sentence of the appellants was unconstitutional, null and void. (paras 31-33 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman atas pertuduhan alternatif di bawah s. 149 Kanun Keseksaan ('Kanun') dan dihukum di bawah s. 302 Kanun yang sama. Pada asalnya, perayu pertama dan kedua dituduh dan dibicarakan bagi kesalahan membunuh di bawah s. 302 Kanun dibaca bersama dengan s. 34 Kanun yang sama kerana menyebabkan kematian seorang yang bernama Te Lui Yet ('simati'). Pada pertengahan perbicaraan di Mahkamah Tinggi, Timbalan Pendakwa Raya ('TPR') mengemukakan pertuduhan alternatif di bawah s. 149 Kanun terhadap perayu-perayu. Pada akhir kes perbicaraan, hakim bicara mendapati bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* terhadap perayu-perayu atas pertuduhan asal membunuh (s. 302 Kanun). Walau bagaimanapun, hakim bicara mendapati pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu-perayu atas pertuduhan alternatif dan memanggil perayu-perayu untuk membela diri. Perayu-perayu telah

memberi keterangan selepas mengangkat sumpah. Pada akhir perbicaraan, hakim bicara mendapati bahawa perayu-perayu bersalah di bawah pertuduhan alternatif kerana perayu-perayu telah menjadi ahli-ahli perhimpunan haram dengan niat bersama melakukan pembunuhan si mati dan menjatuhkan hukuman mati ke atas perayu-perayu. Perayu-perayu telah membangkitkan beberapa alasan rayuan, antara lain: (i) hakim bicara khilaf apabila membenarkan pihak pendakwaan mengemukakan pertuduhan alternatif di bawah s. 149 Kanun tanpa keizinan bertulis Pendakwa Raya di bawah s. 177A Kanun Tatacara Jenayah ('KTJ') bagi pendakwaan perayu-perayu atas pertuduhan alternatif; (ii) pengemukaan pertuduhan alternatif pada pertengahan perbicaraan telah meletakkan perayu-perayu dalam kelemahan taktikal; (iii) hakim bicara telah khilaf apabila memanggil perayu-perayu untuk membela diri selepas melepaskan mereka dari pertuduhan asal; (iv) pihak pendakwaan tidak berjaya membuktikan kes bagi kesalahan di bawah s. 149 Kanun; dan (v) pihak pendakwaan gagal membuktikan bahawa perayu-perayu mempunyai 'niat bersama' dalam pelakuan kesalahan itu di bawah pertuduhan alternatif.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Abu Samah Nordin HMR (Aziah Ali HMR menyetujui) menyampaikan penghakiman majoriti):

(1) Perbicaraan perayu-perayu atas pertuduhan alternatif tidak terbatal walaupun tiada keizinan bertulis dari Pendakwa Raya. Pendakwaan di Mahkamah Tinggi dikendalikan oleh TPR sendiri. Dalam keadaan sedemikian, keizinan mendakwa tertuduh atas pertuduhan alternatif boleh tersirat (*Tarmizi Yaacob & Anor v. PP & Another Appeal*, refd)

(2) Ia adalah dalam budi bicara Pendakwa Raya untuk memutuskan jenis pertuduhan yang harus dikemukakan dalam perjalanan perbicaraan. Kuasa budi bicara Pendakwa Raya untuk mengemukakan pertuduhan alternatif sebelum penutupan kes pendakwaan bukan pelanggaran kuasa mahkamah untuk meminda atau menambah pertuduhan pada bila-bila masa sebelum penghakiman di bawah s. 158 KTJ. Perayu-perayu tidak diprejudiskan dengan pengemukaan pertuduhan alternatif yang mereka meminta untuk dibicarakan. Tiada alasan di sini untuk memutuskan bahawa terdapat salah laksana keadilan.

(3) Terdapat keterangan memadai yang menunjukkan 'niat bersama' perayu-perayu berdasarkan keterangan PW7, PW8 dan PW21. PW7 telah melihat perayu pertama menggunakan kayu baseball untuk memukul kepala si mati. PW8 telah melihat perayu kedua memukul si mati dengan tangannya. Doktor (PW10) yang menjalankan bedah siasat ke atas si mati memberi keterangan bahawa terdapat luka-luka calar di bahagian kepala si mati disebabkan objek tumpul. Punca kematian disebabkan beberapa kesan tikaman. Terdapat keterangan dari PW7 dan PW21 bahawa objek-objek tajam seperti pisau dan parang panjang digunakan oleh beberapa ahli perhimpunan haram tersebut dalam melaksanakan niat bersama yang menyebabkan pelbagai kecederaan yang dialami si mati.

(4) Terdapat keterangan memadai untuk menyokong dapatan fakta yang arif hakim bahawa perayu-perayu telah mengambil bahagian di dalam perhimpunan haram dengan niat bersama menyebabkan kematian si mati dan kerana mereka ahli-ahli perhimpunan haram itu, mereka tahu kesalahan tersebut mungkin akan dilakukan dalam melaksanakan niat bersama itu.

Hishamudin Mohd Yunus (menentang):

(1) Seksyen 166 Kanun Tatacara Jenayah (KTJ) yang disandarkan oleh TPR untuk mewajarkan pengemukaan pertuduhan alternatif pada peringkat prosiding itu, tidak memberikan sebarang kuasa kepada pihak pendakwaan untuk mengemukakan pertuduhan alternatif selepas perbicaraan itu dimulakan. Pertuduhan alternatif, seperti juga pertuduhan utama, dalam usaha untuk pihak pendakwaan mengemukakannya tanpa campur tangan mahkamah perbicaraan, harus dikemukakan pada permulaan perbicaraan.

(2) Pertuduhan alternatif adalah pertuduhan tambahan kepada pertuduhan utama bagi tujuan ss. 158 dan 159 KTJ. Sebaik sahaja perbicaraan bermula, apa-apa tambahan kepada pertuduhan utama hanya boleh dilaksanakan dengan perintah hakim perbicaraan menurut s.158 KTJ. Pihak pendakwaan tidak boleh mengemukakan pertuduhan tambahan sesuka hati. Jika pihak pendakwaan ingin mengemukakan pertuduhan tambahan (termasuk pertuduhan alternatif) pada mana-mana peringkat sebaik sahaja perbicaraan telah bermula, ia harus membuat permohonan untuk berbuat demikian di bawah s. 158 KTJ.

(3) Sebaik sahaja perbicaraan dimulakan, hakim perbicaraan mempunyai kawalan ke atas prosiding dan bukan pihak pendakwaan. Beliau adalah pengadil. Hakim perbicaraan harus memastikan perbicaraan dikendalikan dengan adil. Ia akan memprejudiskan pihak pembelaan jika pihak pendakwaan diberikan kebebasan mengemukakan pertuduhan alternatif pada bila-bila masa selepas perbicaraan telah dimulakan. Mengekalkan keadilan dalam prosiding memerlukan pengemukaan pertuduhan alternatif dilakukan melalui hakim perbicaraan, dan pihak pendakwaan harus mewajarkan pengemukaan alternatif pada peringkat prosiding itu. Pihak pendakwaan tidak boleh mengemukakan pertuduhan alternatif pada pertengahan perbicaraan, semata-mata sebagai sesuatu yang difikirkan kemudian; atau semata-mata sebab pihak pendakwaan tidak mengkaji kes dengan teliti sebelum membuat pertuduhan asal. Seterusnya, salah satu keperluan s. 159 adalah ia sememangnya mandatori untuk mahkamah perbicaraan menyoal tertuduh sama ada tertuduh bersedia untuk diperbicarakan terhadap pertuduhan tambahan. Ini tidak dilakukan di dalam kes ini.

(4) Pertuduhan alternatif adalah tak sah. Ini telah mencemari kesahihan keseluruhan perbicaraan yang telah menjadi terbatal. Seksyen 422 KTJ tidak boleh digunakan untuk menyelamatkan keadaan. Ini bukanlah kes ketidakaturan semata-mata. Kecacatan undang-undang ini adalah asasi (*Harun Abdullah v. Public Prosecutor*, dirujuk). Seterusnya, per. 145 Perlembagaan Persekutuan tidak memberi apa-apa kuasa kepada pihak pendakwaan untuk mengabaikan peruntukan-peruntukan KTJ. KTJ telah digubal oleh Parlimen untuk memastikan prosiding-prosiding jenayah dikendalikan dengan adil. Di sini, perbicaraan tidak dikendalikan mengikut undang-undang. Oleh itu, sabitan dan hukuman perayu-perayu tidak mengikut perlembagaan, tak sah dan terbatal.

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Barendra Kumar Ghosh v. Emperor AIR 1925 PC 1 ***(refd)***
Bunnilal Chandhary v. State of Bihar [2006] Cri LJ 3297 ***(refd)***
Chandran & Ors v. PP [1992] 2 SLR 265 ***(refd)***
Garmaz s/o Pakhar & Anor v. PP [1995] 3 SLR 701 ***(refd)***
Gillard v. R [2003] HCA 64 ***(refd)***
Harun Abdullah v. PP [1998] 3 CLJ 184 CA ***(refd)***
Lalji & Ors v. State of UP AIR 1989 SC 754 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohd Haikal Mohd Khatib Saddaly & Ors v. PP [2011] 5 CLJ 369 CA ***(refd)***
PP v. Oie Hee Koi & Associated Appeals [1967] 1 LNS 132 PC ***(refd)***
PP v. Thurairaj Arulnathan [2009] 1 LNS 542 HC ***(refd)***
R v. Jones [1974] 59 Cri App R 120 ***(refd)***
R v. Turnbull [1977] QB 224 ***(refd)***
Ram Dular Rai v. State of Bihar [2004] Cri LJ 635 ***(refd)***
Sita Ram v. State of MP [1991] 3 Crimes 523 (MP) ***(refd)***
Sukha & Ors v. State of Rajasthan AIR 1956 SC 513 ***(refd)***
Tarmizi Yacob & Anor v. PP & Another Appeal [2010] 8 CLJ 501 FC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158(1), 159, 160, 166, 177A, 422
Federal Constitution, arts. 145(3)
Penal Code, ss. 34, 149, 302

Indian Code of Criminal Procedure, s. 216(1)

Other source(s) referred to:
Gour, *Penal Law of India*, 7th edn, p 710
Sarkar Criminal Procedure Code, vol 9, 9th edn (2010 reprint) p 989

For the 1st appellant - Karpal Singh (Sanjeet Kaur Deo with him); M/s Karpal Singh & Co
For the 2nd appellant - Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him); M/s Shafee & Co
For the respondent - Mohd Abazafree Abas DPP

[Appeal from High Court, Malacca; Criminal Trial No: 45-04-06]

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Samah Nordin JCA:

[1] This is the majority judgment of the court. My learned sister, Justice Aziah Ali had seen this judgment in draft and expressed her agreement with it.

[2] We have before us an appeal by the appellants against their convictions on an alternative charge under s. 149 of the Penal Code ('the Code') and punishable under s. 302 of the said Code.

A **[3]** Originally the first and second appellants (1st and 3rd accused in the High Court below) were charged and tried for an offence of murder under s. 302 of the Code read with s. 34 of the Code together with the 2nd and 4th accused for causing the death of one Te Lui Yet ('deceased').

B

[4] In the midst of the trial at the High Court, that is, after the 5th prosecution witness had given evidence, the learned deputy public prosecutor ('DPP') tendered an alternative charge under s. 149 of the Code and punishable under s. 302 of the Code
C against all the four accused together with fourteen others who were at large. Section 149 of the Code provides that where an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such members of that assembly knew to be likely to be committed in
D prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of an offence. The alternative charge was read, explained and understood by all the accused. They also claimed trial to the alternative charge.

E

[5] From that point onwards all the four (4) accused were tried under both charges. The prosecution called twenty two (22) witnesses.

[6] At the end of the prosecution case, the learned trial judge
F found that the prosecution had failed to prove a *prime facie* case against all the four (4) accused on the original charge of murder under s. 302 of the Code. Accordingly the learned judge acquitted and discharged them on the said charge.

G **[7]** The learned judge however found that the prosecution had established a *prima facie* case against the appellants on the alternative charge and called upon them to enter their defence. Both appellants gave evidence on oath. At the end of the trial, the learned judge held that the appellants had failed to raise any
H reasonable doubt on the prosecution case and accordingly found them guilty on the alternative charge and sentenced them to death.

[8] Before us, the respective learned counsel for the appellants
I raised several grounds of appeal, some of which are grounds common to both appellants. With respect to the common grounds learned counsel for the second appellant, adopted, wherever applicable, the submission of learned counsel for the first appellant.

Appeal By The First Appellant

[9] The main ground of appeal by the first appellant is that the learned judge was wrong in allowing the prosecution to introduce an alternative charge under s. 149 of the Code and punishable under s. 302 of the said Code in the midst of the trial as the case was only transmitted to the High Court pursuant to the written consent of the Deputy Public Prosecutor under s. 177A of the Criminal Procedure Code ('CPC') for trial under s. 302 of the Penal Code. There was no written consent by the deputy public prosecutor under s. 177A of the CPC for prosecution of the four accused on the alternative charge. It was submitted that the introduction of the alternative charge in the midst of the trial had placed the appellants in a tactical disadvantage and deprived them of the benefit of recalling the witnesses. Under the circumstances learned counsel for the 1st appellant contended that the trial was a nullity entitling the appellants to be acquitted and discharged. (*Teh Cheng Poh v. PP* [1978] 1 LNS 202). It was contended that since there was a delay of more than six years, there ought not to be a retrial.

[10] The next ground raised by the 1st appellant is that the learned judge erred in calling upon the appellants to enter their defence on the alternative charge after having acquitted them on the original charge under s. 302 of the Penal Code. The learned judge had also misdirected himself on the law on *prime facie* without subjecting the prosecution evidence to a maximum evaluation (*Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; *Magendran Mohan v. PP* [2011] 1 CLJ 805).

[11] The other grounds raised by the 1st appellant include, among others, the failure of the learned judge in not holding the evidence of identification as defective for failing to conform to the Turnbull guidelines (*R v. Turnbull* [1977] QB 224). The judgment of the learned judge, it was submitted, was sketchy and not a speaking judgment. The learned judge also erred in not directing his mind to the defence of sudden fight.

Appeal By The 2nd Appellant

[12] Next, I come to the grounds of appeal by the 2nd appellant. Learned counsel for the 2nd appellant also raised several grounds of appeal. The main thrust of the 2nd appellant's contention is that the prosecution had not made out a case for an offence under s. 149 of the Code which is punishable under s. 302 of the

said Code. The only evidence against the 2nd appellant was based on the evidence of PW8, who was not a credible witness and whose evidence was without any corroboration. PW8 testified that he only saw the 2nd appellant hitting the deceased with his hands.

[13] There were also major inconsistencies in the prosecution evidence and that the learned judge had contradicted himself in his evaluation of the evidence of witnesses before him, including the perfunctory manner the learned judge dealt with the evidence relating to identification of the appellants.

[14] Before us, learned counsel for the second appellant submitted at length on the ingredients to be proved for an offence under s. 149 of the Penal Code and punishable under s. 302 of the said Code. It was contended that the prosecution had failed to prove that the appellants had a 'common object' in the commission of the offence in the alternative charge. Several cases were cited to us by learned counsel for the 2nd appellant. See *Ram Dular Rai v. State of Bihar* [2004] Cri LJ 635, *Sita Ram v. State of MP* [1991] 3 Crimes 523 (MP), *R v. Jones* [1974] 59 Cri App R 120, *PP v. Thurairaj Arulnathan* [2009] 1 LNS 542, *Bunnilal Chandhary v. State of Bihar* [2006] Cri LJ 3297, *Gillard v. R* [2003] HCA 64. Learned counsel for the 2nd appellant submitted that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and that he was actuated by that common object.

[15] In response to the 2nd appellant's submission on s. 149 of the Code learned DPP for the respondent cited to us, among others, *Mohd Haikal Mohd Khatib Saddaly & Ors v. PP* [2011] 5 CLJ 369, *Lalji & Others v. State of UP* AIR 1989 SC 754, *Sukha & Ors v. State of Rajasthan* AIR 1956 SC 513, 518, *Chandran & Ors v. PP* [1992] 2 SLR 265 at 269, *Barendra Kumar Ghosh v. Emperor* AIR 1925 PC 1.

[16] We have read and considered the authorities and the submission by the respective parties. Our views on the specific issues raised by the appellants are as follows.

Consent Of Prosecution To The Alternative Charge

[17] The first issue is on consent of the prosecution to the alternative charge. In our considered view, the trial of the appellants on the alternative charge was not a nullity notwithstanding the absence of a written consent from the DPP.

We note that the prosecution at the High Court was conducted by the DPP himself. Under the circumstances consent to the prosecution of all the accused on the alternative charge could be implied: *Tarmizi Yacob & Anor v. PP & Another Appeal* [2010] 8 CLJ 501, *Garmaz s/o Pakhar & Anor v. PP* [1995] 3 SLR 701, *PP v. Oie Hee Koi & Associated Appeals* [1967] 1 LNS 132.

[18] The notes of proceedings at the High Court showed that the alternative charge was read to all the accused, including the appellants and that they claimed trial to the alternative charge. The appellants were represented by counsel, who did not raise any objection to the alternative charge nor applied to recall any prosecution witnesses pursuant to the introduction of the alternative charge. The court, which had control of the whole proceedings, did not object to the tendering of the alternative charge.

[19] It is within the discretion of the public prosecutor to decide what charges should be preferred in the course of the trial. In *Long Samat & Ors v. PP* [1974] 1 LNS 80 at pp. 156-158, Suffian LP, after citing s. 376 of the CPC said:

> ... from this it would appear that the Public Prosecutor has a discretion as to what charges should be preferred, subject of course to the power of the court to amend charges in the course of trial. That the law intends to give a wide discretion over criminal prosecutions to the Public Prosecutor appears from other provisions of the Criminal Procedure Code providing that for the prosecution of certain offence his complaint is required (section 130) and yet for other offences his written sanction (section 120).

[20] In respect of art. 145(3) of the Constitution, Suffian LP said;

> In our view this clause from the Supreme law clearly gives to Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he instituted, and the courts cannot compel him to institute any criminal proceedings he does not wish to institute or to go on with any criminal proceedings which he decided to discontinue.

[21] The discretionary power of the public prosecutor to prefer an alternative charge before the close of the prosecution case is not a transgression of the power of the court to alter or add a charge at any time before judgment under s. 158 of the CPC. In

A our view the appellants were not in any way prejudiced by the introduction of the alternative charge to which they claimed trial. There is no ground before us to conclude that there was a miscarriage of justice.

B **Common Object**

[22] The next issue is whether the prosecution had established that the appellants had a common object in the commission of the offence in the alternative charge. The words "common object" in s. 149 of the Penal Code do not necessarily bear the same C meaning as the words "common intention" in s. 34 of the Penal Code. In *Sukha & Ors v. State of Rajasthan* AIR 1956 GC 513, the Supreme Court of India held that:

> a common object is different from a common intention in that it D does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get together.

[23] Section 149 of the Code does not require proof of a prearranged plan and a common intention which a prosecution E involving s. 34 of the Code would require (*Chandran & Ors v. PP* [1992] 2 SLR 265).

[24] Section 149 speaks of "common object" of the assembly as opposed to "common intention" of several persons in s. 34 of the F Penal Code.

[25] In *Lalji & Ors v. State of UP* AIR 1989 SC 754, the Supreme Court of India held that:

> G Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. The section creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful H assembly extends only to the act done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with him own hands would be immaterial.

I

[26] Gour's *"Penal Law of India"* (7th edn.) at p. 710 states:

> The purpose for which the members of the assembly set out or which they desired to achieve is the object. Each member may have an object in view and may also have his own idea of the means with which that object is to be achieved and the extent to which he is prepared to go for attaining it. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved; the object then becomes the common object of the assembly. Normally, a determination to achieve an object includes a resolve to meet with force any resistance to its attainment. A common object may be found by express agreement after mutual consultations but that is not necessary. It may be formed at any stage by all or some members of the assembly and the other members may join and accept it. It may be modified or altered or abandoned at any stage. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined by keeping in view the nature of the assembly, the arms it carries and the behaviour of its members at or near the scene of the incident.

[27] In our judgment, there was sufficient evidence before the learned judge which point to the 'common object' of the appellants based on the evidence of PW7, PW8 and PW21.

[28] PW7 saw the first appellant used the baseball bat to hit the deceased's head. PW8 saw the 2nd appellant hit the deceased with his hands. It is immaterial what role he played in the prosecution of the common object. As the Supreme Court in *Lalji & Ors v. State of UP* said, "once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial". The second appellant was not a mere bystander.

[29] The doctor (PW10) who conducted the post-mortem on the deceased gave evidence that there were laceration wounds on the head of the deceased and that the deceased's fractured skull was caused by a blunt object. When shown the baseball bat, he said that it could be the blunt object.

[30] According to PW10, the cause of death was due to multiple stab wounds. There was evidence from PW7 and PW21 that sharp objects such as knife and "parang panjang" were used by the other members of the unlawful assembly in the prosecution of the common object resulting in the multiple injuries suffered by the deceased. PW8 himself was also stabbed with a knife.

[31] There was also evidence from PW7 and PW8 that a car bearing registration No. MBD9199 ('Avanza') was used to run over the deceased when he fell down. PW16, the police forensic expert, testified that the deceased's blood stains were found on the front bumper and the under carriage of the said car. PW7 at p. 74 of the appeal record said:

> *Saya mengelak kereta itu terus langgar OR LANG ... Kereta itu terus lari dari situ. Saya lihat OR LANG terbaring di atas jalan.* OR LANG was the nickname of the deceased.

PW8 at p. 6 of the appeal record said:

> selepas mereka pukul kami mereka naik kereta Avanza itu semula dan menggelek Or Lang ('deceased') yang ada di situ.

[32] SP21 at p. 203 of the appeal record said:

> saya cuba tarik OR LANG (deceased) tetapi tak sempat kerana kepala OR LANG sudah berada di bawah kereta.

The driver of the car then got out of his car. This is what SP21 said:

> saya nampak orang itu menggunakan kayu, parang, pisau dan kayu baseball.

[33] The identity of the appellants is not based solely on the evidence of PW7, PW8 and PW21 in the identification parade: *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800. It is also in evidence that PW8 knew the appellants more than one year prior to the incident. PW9 also knew the first appellant as he was her boyfriend's friend.

[34] We find that there was sufficient evidence to support the learned judge's findings of fact that the appellants had participated in the unlawful assembly with the common object of causing the death of the deceased and that being members of the unlawful assembly, they knew that the said offence would be likely to be committed in the prosecution of that common object.

[35] For the above reasons, we dismiss the appeal by the appellants and affirm the conviction and sentence of the learned judge.

Hishamudin Mohd Yunus JCA:

[36] This is an appeal by the appellants, namely, Fam Meng Siong and Tan Jui Bin, against the decision of the High Court of Malacca. On 8 July 2008 the High Court had found them guilty of the charge of being members of an illegal assembly with the common object of committing the murder of one Te Lui Yet; an offence under s. 149 of the Penal Code read with s. 302 of the same. They were sentenced to death.

[37] Having heard submissions on 3 and 27 January 2012, we had reserved judgment.

[38] Today, we deliver our judgment.

[39] On my part, I am allowing the appeal.

[40] My reasons are as follows.

[41] In the instant case, originally, the appellants were charged with two other co-accused under s. 302 of the Penal Code read with s. 34 of the same. The charge reads:

> **Pertuduhan:**
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> Bahawa kamu bersama-sama yang lain, pada 29/04/2005 jam antara 2.00 pagi hingga 2.15 pagi, di belakang Pasaraya Senyum Super Plaza Melaka Raya, Taman Melaka, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, dengan niat bersama, telah melakukan pembunuhan sehingga menyebabkan kematian ke atas Te Lui Yet, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun yang sama.

[42] Subsequently, during the trial, after the prosecution had called five witnesses, the prosecution tendered an alternative charge under s. 302 but this time read with s. 149 of the Penal Code. This alternative charge reads:

> **Pertuduhan Pilihan:**
>
> Bahawa kamu bersama-sama 14 yang lain pada 29 April 2005 di antara jam lebih kurang 2.00 pagi dan 2.15 pagi bertempat di belakang Pasaraya Senyum Super Plaza Melaka di dalam Daerah Melaka Tengah di dalam Negeri Melaka adalah Ahli Perhimpunan yang menyalahi undang-undang di mana tujuan bersama kamu adalah untuk mengakibatkan kematian Te Lui Yet (No. Kad Pengenalan: 851215-04-5333) dan semasa kamu berada di dalam

perhimpunan tersebut semua ahli perhimpunan tersebut seorang atau lebih daripada seorang daripada kamu dalam melaksanakan tujuan bersama kamu telah melakukan bunuh dengan menyebabkan kematian Te Lui Yet (No. Kad Pengenalan: 851215-04-5333), iaitu satu kesalahan di mana ahli-ahli perhimpunan mengetahui mungkin dilakukan dalam melaksanakan tujuan bersama perhimpunan tersebut dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah seksyen 302 Kanun tersebut.

[43] From the grounds of judgment of the learned trial judge, one gets the impression that the alternative charge was tendered together with the principal charge at the commencement of the trial.

[44] However, this was not the case. As I have said earlier, this alternative charge was tendered by the prosecution only after five prosecution witnesses had testified.

[45] From the notes of evidence, it appears that the above alternative charge was tendered by the Deputy Public Prosecutor at the trial without making an application to the court pursuant to s. 158 of the Criminal Procedure Code ('the CPC'). This section provides:

Court may alter or add to charge

158. (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

[46] The notes of evidence read:

Timbalan Pendakwa Raya:

Kemukakan pertuduhan pilihan

Mahkamah:
Eksibit P58.

Mahkamah:

Pertuduhan dibaca dan faham - Eksibit P58

Orang Kena Tuduh 1: Mohon bicara
Orang Kena Tuduh 2: Mohon bicara
Orang Kena Tuduh 3: Mohon bicara
Orang Kena Tuduh 4: Mohon bicara

[47] Encik Abazafree Abas, the learned DPP, on being asked by me, confirmed that this tendering of the alternative charge was not made pursuant to an application to the trial court under s. 158 of the Criminal Procedure Code ('the CPC'), but was made pursuant to s. 166 of the CPC. He takes the position that the prosecution has the power to do so without having to make an application under s. 158.

[48] Section 166 of the CPC reads:

> 166. Where it is doubtful what offence has been committed
>
> If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences; and any number of the charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

[49] The notes of evidence also show the unfortunate fact that the learned trial judge, with respect, had allowed the learned Deputy Public Prosecutor to do what he did without any question asked. The learned trial judge merely marked the alternative charge as an exhibit (exh. P58). The fact that the learned Deputy Public Prosecutor did not bother to apply to the court to tender an alternative charge pursuant to s. 158 of the CPC did not (again with respect) appear to trouble the learned trial judge at all.

[50] It is significant to note that after the tendering of the alternative charge, the main charge was not abandoned but was still proceeded with until the close of the prosecution case.

[51] When the alternative charge was tendered, the two appellants (and the other two co-accused) were asked to plead; and after they (and the two other co-accused) claimed trial to the alternative charge, the learned trial judge continued with the trial. It is important to note that the two appellants (as well as the other two co-accused) were never asked as to whether they agreed or objected to the alternative charge; nor were they asked as to whether they were ready to proceed immediately on the alternative charge.

[52] At the close of the prosecution case, after hearing submissions of no case to answer, the learned trial judge acquitted both the appellants (as well as the other two co-accused) on the main charge (s. 302 of the Penal Code read with s. 34 of the

same) but called upon both the appellants (only the two appellants) to enter their defence on the alternative charge (s. 302 read with s. 149 of the Penal Code).

[53] In making their defence, both appellants gave sworn evidence. The learned trial judge at the conclusion of the trial found both appellants guilty of the alternative charge and imposed the mandatory death sentence.

[54] Both appellants appeal to this court against their conviction and sentence.

[55] The prosecution, however, is not appealing against the acquittal of the appellants (or the acquittal of the other two co-accused) on the principal charge at the close of the case for the prosecution.

[56] Before this court the appellants submits that the alternative charge is invalid and a nullity; and it follows that the conviction and sentence is bad in law.

[57] It is argued by the appellants that once a trial has commenced the prosecution can no longer tender an alternative charge as of right. It is argued by the appellants that once a trial has commenced the prosecution must follow the procedure as prescribed by ss. 158 and 159 of the CPC in order to tender an alternative charge.

[58] This means that the prosecution must apply to the trial court pursuant to s. 158 of the CPC that they be allowed to tender an alternative charge; and the trial court must exercise its discretion as to whether to allow or not the tendering of the alternative charge. And if the trial court, having exercised its discretion, decides to allow the tendering of the alternative charge, then the trial court must make an order accordingly.

[59] In my judgment s. 166 of the Criminal Procedure Code ('the CPC'), that is being relied upon by the learned DPP to justify the tendering of the alternative charge at that stage of the proceedings, does not confer any power on the prosecution to tender an alternative charge after the trial has progressed. An alternative charge, like the principal charge, in order for it to be tendered by the prosecution without the intervention of the trial court, must be tendered at the commencement of the trial. Section 166 only deals with prescribing the manner of framing a

charge (or charges) where there is a doubt on the part of prosecution as to the actual nature of the offence (or offences) that is alleged to have been committed. This provision has no relevance on the question as to whether or not the prosecution can tender an alternative charge once the trial has progressed.

[60] In my view, an alternative charge is an additional charge to the principal charge for the purpose of ss. 158 and 159 of the CPC. According to *Sarkar Criminal Procedure Code* vol. 1, 9th edn (Reprint 2010), on the meaning of the word 'add to' as found in sub-s. (1) of s. 216 of the Indian Code of Criminal Procedure (which is in *pari materia* with sub-s. (1) of s. 158 of the our CPC) (at p. 989):

> The words 'add to' mean addition of new charge and not mere addition of a few words or corrections.

[61] In my judgment, once a trial has started, any addition to the principal charge can only be done with an order of the trial judge pursuant to s. 158 of the CPC. This means that the prosecution can no longer tender the additional charge as of right. If the prosecution wishes to tender an additional charge (which includes an alternative charge), at any stage once the trial has progressed, it must make an application to do so under s. 158 of the CPC, meaning that there must be an application to the trial court by the prosecution to tender the alternative charge, giving reasons for the necessity to do so; and the trial court must apply its mind to the application; must exercise its discretion, after having given the defence an opportunity of being heard on the application to tender the alternative charge. Having heard both sides, then the trial court must make an order allowing or disallowing the tendering of the proposed alternative charge.

[62] The reason as to why the prosecution must apply to the trial court, in order to tender an alternative charge, is not difficult to understand. Once a trial has commenced the trial judge is in control of the proceedings and not the prosecution. He is the adjudicator. The trial judge is there to ensure that that the trial is conducted in a fair manner; and not arbitrarily. It would be prejudicial to the defence if the prosecution is given a free hand to tender an alternative charge at any time it likes after the trial has commenced. Maintaining fairness in the proceedings requires that the tendering of the alternative charge has got to be made through the trial judge, and the prosecution must justify the tendering of the alternative at that stage of the proceedings. The

tendering of the alternative charge at that stage must relate to the entire evidence so far adduced at the trial by the witnesses up to that stage. The prosecution cannot tender an alternative charge in the midst of the trial merely as an afterthought; or merely because the prosecution had not carefully studied its case before preferring the original charge. And as for the defence, it ought to be given an opportunity to be heard in relation to the proposed alternative charge. The trial judge must exercise his discretion after having examined the view of both sides (the prosecution and the defence) and the entire scenario of the proceedings at that stage, always bearing in mind that he is there as an adjudicator to ensure that the proposed alternative charge does not prejudice the defence.

[63] Now if the trial court, having exercised its discretion under s. 158, were to allow the tendering of the alternative charge, then the trial court must comply with the provision of s. 159 of the CPC. This provision states:

> When trial may proceed immediately after alteration or addition
>
> 159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

[64] In view of the words "... the court shall call upon the accused ... to state whether he is ready to be tried ...", one of the requirements of the section is that it is mandatory for the trial court to ask the accused as to whether he is ready to be tried on the added charge. Needless to say, this has not been done in the present case.

[65] In fact under s. 160 of the CPC the trial judge even has the power to direct that the trial be conducted afresh or that the trial be adjourned to another date if he is of the view that to continue with the trial immediately after the tendering of the alternative charge would be prejudicial to the accused. This section reads:

When new trial may be directed or trial suspended

160. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[66] In the present case, as the prosecution had erroneously assumed that it is not bound by s. 158 of the CPC, that it had the power to tender an alternative charge pursuant to s. 166 of the CPC, after five prosecution witnesses had been called, that is to say, in the midst of the trial, when in law it does not have such a power to by-pass s. 158, the alternative charge is, therefore, invalid and is a nullity. This tainted the legality of the whole trial. The whole trial had become a nullity.

[67] In my judgment, since the alternative charge is an invalid charge and therefore, a nullity, s. 422 of the CPC could not be invoked to salvage the situation. This is not a case of a mere irregularity. The legal defect is fundamental. In *Harun Abdullah v. Public Prosecutor* [1998] 3 CLJ 184 Malek Ahmad JCA (as he then was), in delivering the judgment of the Court of Appeal, said (at p. 197):

> Of these three decisions, we must say that we are in full agreement with the decision in *Ishak Shaari v. PP* where the learned trial judge held that s. 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice.

[68] And I think I should also add that art. 145 of the Federal Constitution does not give any power to the Public Prosecutor to disregard the provisions of the CPC. The CPC is enacted by the Parliament to ensure that criminal proceedings are conducted in a fair manner.

[69] The provisions of the CPC (particularly, ss. 158, 159 and 160) govern the prosecution inasmuch as they govern the defence.

[70] Since the alternative charge is invalid and a nullity, the fact that the appellants were represented by counsel at the trial and that their counsel did not object to the tendering of the alternative charge is, to my mind, immaterial. The fact of not objecting does

A make an invalid charge a valid charge. The appellants ought not to be prejudiced or penalised, or to be allowed to suffer the consequences, by reason of the oversight or blunder on the part of their counsel during the trial.

B **[71]** I propose to conclude by saying that art. 5 of the Federal Constitution must always be upheld. No person shall be deprived of his life or personal liberty save in accordance with the law. In the present case, in my judgment, it is clear that the trial had not been conducted in accordance with the law, namely, the CPC.
C Hence the conviction and sentence of the appellants is unconstitutional, null and void.

[72] I am, therefore, allowing the appeal. The order of the High Court on conviction and sentence is hereby set aside.

D **[73]** Both appellants are acquitted and discharged.

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